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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

**Clerk, U.S. District and
Bankruptcy Courts**

Cynthia A. Frey)
9100 Sterling Montague Dr.)
Great Falls, VA 22066-4004)
~~703-865-7350~~

Plaintiff

v.

DEPARTMENT OF ENERGY,)
FORRESTAL BUILDING)
1000 INDEPENDENCE AVE, S.W.)
WASHINGTON, DC 20585)

and)

THE UNITED STATES OF AMERICA)

Defendants)

Case: 1:08-cv-00694
Assigned To : Bates, John D.
Assign. Date : 4/23/2008
Description: FOIA/Privacy Act

**COMPLAINT FOR RELIEF UNDER
THE FREEDOM OF INFORMATION ACT**

Plaintiff brings this action under the Freedom of Information Act, 5 U.S.C. § 552, to compel the Department of Energy to produce copies of records, used by, or issued by the Department related to an

Inspector General (IG) investigation conducted into misconduct in the office of Pipeline Certificates at the Federal Energy Regulatory Commission (FERC), as described below,

Jurisdiction

This Court has jurisdiction under 28 U.S.C. Section 1331 and 5 U.S.C. Section 552 (a) (4) (B).

Parties

Plaintiff is an attorney advisor at the Federal Regulatory Energy Commission.

Defendant, the Department of Energy (DOE) is an agency of the United States. DOE and the Inspector General of the Department of Energy (OIG), its office of hearings and Appeals (OHA) and its Office of the Executive Secretariat have possession and control of the records at issue in this action.

Background: The Procedural Path of the FOIA Request

On February 15, 2002, Plaintiff filed a FOIA request for copies of documents related to an Office of Inspector General (OIG) investigation conducted into alleged criminal misconduct in the Office of Pipeline Certificates at the Federal Energy Regulatory Commission, for the testimony of FERC supervisor of Maynard Ugol and the testimony of Deborah Grayson, a secretary at FERC. On May 9, 2002, the OIG released three documents in their entirety, released 32 documents with material withheld pursuant to FOIA exemptions 6 and 7(C), and released two documents with material withheld

under Exemptions 5,6, and 7(C). The documents released by the OIG to the Plaintiff were heavily redacted, indecipherable and non-responsive to her request.

On July 9, 2002, Plaintiff filed an appeal with the Department of Energy's Office of Hearings and Appeals (OHA) protesting the failure of OIG to release the interviews of Maynard Ugol and Deborah Grayson. Plaintiff argued that the OIG released a "heavily redacted, partial response that falsely gave the impression that the investigation had ended months before Maynard Ugol testified to OIG investigator, Yvette Milam.

Mr. Ugol testified twice to Yvette Milam, the first time in the summer or early fall of 1996, and for the second time in late November or early December of 1996. Mr. Ugol retired a few weeks later in January 1997. The appeal filed by Plaintiff on July 9, 2002, OHA Case No. VFA-0754, was denied on December 2, 2002, based on the privacy interests of Maynard Ugol and Deborah Grayson.

On June 30, 2004, Plaintiff, through her counsel, sent a letter to OHA, requesting copies of all DOE records submitted to, used by or issued by the agency in reaching its decision and order of December 2, 2002. OHA responded to Plaintiff's request on July 15, 2004, "providing copies of the 'documents contained in its case file in Case No. VFA-0754,'" despite the fact that Plaintiff had requested a broader submittal, as described above. The Office of the Executive Secretariat responded to Plaintiff's request on August 4, 2004, providing little or nothing relevant to the request. OIG responded to Plaintiff's June 30, 2004 request on August 30, 2004. In its response, OIG stated that it had no responsive documents other than those that it had already provided to Plaintiff in May 2002, and therefore would not be providing any more documents.

In her September 29, 2004 appeal, Plaintiff argued that OHA's response to her June 30, 2004, request, was incomplete, because it "did not include any of the OIG's investigative records. . . despite the fact that OHA obtained and reviewed 'unredacted copies' of such materials." Plaintiff appealed OIG's refusal to produce documents responsive to her request. Plaintiff also argued that the response of the Office of the Executive Secretariat was incomplete, because it did not include any of OIG's investigative records.

On October 22, 2004, Plaintiff's appeal was denied in part and granted in part in OHA Dockets TFA-0072 and TFA-0073. The OHA stated, "We are remanding to OIG the matter of whether any documents pertaining to Mr. Ugol created or obtained in the course of the OIG investigation described above may now be released to [Plaintiff], in light of the evidence [she] has submitted regarding his death." Maynard Ugol died in June 2003. The OHA remand was limited to Mr. Ugol's testimony concerning drug use and leave abuse.

The OIG responded by producing more records of the investigation. These new records gave lie to the OIG's earlier attempt in 2002 to show that the investigation had ended long before Mr. Ugol has ever testified. Still, in this 2004 release of records, the OIG completely denied that the second interview and testimony by Maynard Ugol in late November or early December 1996, had ever taken place. In fact, Ms. Milam had called Plaintiff at home early in the drab winter morning in 1996, before Mr. Ugol arrived for the second interview, and confirmed it later, by stating, "He sure talked." On one or more subsequent occasions, she told Plaintiff that she knew exactly where Mr. Ugol's testimony was located.

On November 15, 2007, Plaintiff filed a "Complaint for Relief Under The Freedom of Information Act" in Docket No. 1:07-cv-02083. However, since her efforts at service upon the Defendant were unsuccessful, Judge Bates dismissed the case on April 18, 2008, without prejudice to refiling. This complaint is a refiling of Docket No. 1:07-cv-02083.

Request

In light of the foregoing allegations, Plaintiff requests all of the testimony of Maynard Ugol, particularly that of his second interview with Ms. Yvette Milam in late November or early December 1996, as well as all investigative materials, notes and tapes, and copies of all records submitted to, used by or issued by the agency pertaining thereto. Plaintiff also particularly requests that the court not allow DOE to limit the range of testimony or materials contained in a self-defined case file, such as OHA did in its July 15, 2004 submittal to Plaintiff's counsel where it searched "documents contained in its case file" in Case No. VFA-0754" as noted above. Plaintiff also requests that the court not allow DOE to limit its response to annual leave abuse and drug use.

Plaintiff is aware that some of Mr. Ugol's testimony is about her. This is a related matter to US District Court for the District of Columbia Civil Docket Case No. 1:05-cv-00769-RBW.

Claim for Relief

Plaintiff incorporates the allegations above.

The materials at issue in this action are agency records of the DOE within the meaning of 5 U.S.C. Section 552. The Plaintiff has requested release of these records

under FOIA. DOE has either denied or withheld release, or made it appear that these testimonies did not exist. The Plaintiff has exhausted her administrative remedies by filing timely appeals, as described above.

The Department of Energy's own Office of Hearings and Appeals has held that the requested testimony of Maynard Ugol is not exempt from release under the Freedom of Information Act due to his death in June 2003. The OHA ruling is attached.

Relief Requested

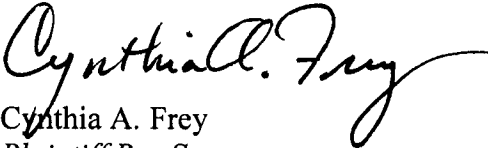
Wherefore, the Plaintiff prays for the following relief:

An order requiring the Department of Energy to make all of the testimony of Maynard Ugol from both of his appearance testimonies before the Office of Inspector General, and all investigative materials and documents submitted, used or produced, including the notes and recordings of Yvette Milam, available to the Plaintiff forthwith;

An award of costs and reasonable attorney fees as authorized by FOIA, 5 U.S.C. Section 552(a) (4) (E) and/or the Equal Access to Justice Act, 28 U.S.C. Section 2412;

Such other and further relief as the court may deem proper.

Respectfully submitted,


Cynthia A. Frey
Plaintiff Pro Se

October 22, 2004

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Cynthia A. Frey

Dates of Filing: September 29, 2004
September 30, 2004

Case Numbers: TFA-0072
TFA-0073

On September 29, 2004, Cynthia A. Frey filed an Appeal (Case No. TFA-0072) from determinations that two offices of the Department of Energy (DOE) issued to her. The determinations responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In each office's determination, DOE released responsive information to Ms. Frey. This Appeal, if granted, would require the offices to perform new searches for additional responsive information. On September 30, 2004, Ms. Frey filed a Request for Reconsideration (Case No. TFA-0073) of a Decision and Order that the DOE's Office of Hearings and Appeals issued to her on December 19, 2002. In that Decision and Order, the DOE withheld from disclosure any statements that former Federal Energy Regulatory Commission (FERC) Deputy Assistant General Counsel Maynard Ugol might have made to the Office of the Inspector General in the course of a particular investigation. This Request for Reconsideration, if granted, would require the DOE to release those statements to Ms. Frey.

I. Background

On February 15, 2002, Ms. Frey filed a request for information, pursuant to the Freedom of Information Act, for a copy of the records related to an investigation the DOE's Office of the Inspector General (OIG) conducted into alleged drug use and leave abuse at FERC's Office of Pipeline Certificates. OIG responded to that request, and Ms. Frey appealed that response to the Office of Hearings and Appeals (OHA). After due consideration, OHA issued a final Decision and Order (Case No. VFA-0754) in which, *inter alia*, it upheld OIG's determination to withhold any statements that Mr. Ugol might have made in the course of that investigation, holding that Exemptions 6 and 7(C) of the FOIA protected the identities of those interviewed. *Cynthia Frey Nordstrom*, 28 DOE ¶ 80,258 (2002). In her Request for Reconsideration, Ms. Frey contends, and has produced evidence, that Mr. Ugol has died. She argues that the privacy interests in Mr. Ugol's participation in the investigation, which formed the foundation for withholding

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APR 23 2008

Clerk, U.S. District and
Bankruptcy Courts

information pertaining to him under Exemption 7(C), have expired, and that information should now be released to her under the FOIA.

On June 30, 2004, Ms. Frey, through her counsel, sent a letter to OHA, requesting copies of all DOE records “submitted to, used by, or issued by the Agency in reaching its Decision and Order [in Case No. VFA-0754].” To ensure a complete response, this request was forwarded to the Headquarters FOIA/Privacy Act Group, which assigned search responsibilities to three offices, OIG, OHA and Executive Secretariat, with instructions that each office should respond directly to the requester.

OHA responded to Ms. Frey’s request on July 15, 2004, providing copies of the documents contained in the case file that corresponds to Case No. VFA-0754. In her Appeal, Ms. Frey contends that OHA’s response is incomplete, because it “did not include any of the OIG’s investigative records . . . despite the fact that OHA obtained and reviewed ‘unredacted copies’ of such materials before issuing its [decision in Case No. VFA-0754].” Appeal at 5.

The Office of the Executive Secretariat responded to Ms. Frey’s request on August 4, 2004. In her Appeal, Ms. Frey contends that this response is also incomplete, because it likewise did not include any of OIG’s investigative records. Appeal at 6. Ms. Frey does not provide any factual basis for this portion of her Appeal. In fact, the Office of the Executive Secretariat’s response is not mentioned again throughout the entirety of her 15-page Appeal. In the absence of any explanation of why this Office’s response is incomplete, for example, why it should have any of OIG’s investigative records, we conclude that the Office of the Executive Secretariat’s search for documents responsive to Ms. Frey’s request was adequate.

OIG responded to Ms. Frey’s request on August 30, 2004. In its response, OIG stated that it had no responsive documents other than those that it had already provided to Ms. Frey in May 2002, and therefore would not be providing any documents. Ms. Frey appeals OIG’s refusal to produce documents responsive to her request. Appeal at 6-7.

II. Analysis

A. Adequacy of the Search

The FOIA requires that federal agencies generally release documents to the public upon request. Following an appropriate request, the FOIA requires agencies to search their records for responsive documents. We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search was in fact inadequate. *See, e.g., Alice McMillan*, 28 DOE ¶ 80,118 (2004). To determine whether an agency’s search was adequate, we must examine its actions under a “standard of reasonableness.” *McGehee v. CIA*, 697 F.2d 1095, 1100-01 (D.C. Cir. 1983), *modified in part on rehearing*, 711 F.2d 1076 (D.C. Cir. 1983). This standard “does not require absolute exhaustion of the files; instead, it requires a search

reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985). Consequently, the determination of whether a search was reasonable is "dependent upon the circumstances of the case." *Founding Church of Scientology v. NSA*, 610 F.2d 824, 834 (D.C. Cir. 1979).

1. Office of Hearings and Appeals

We reviewed the procedure this Office followed in producing its response to Ms. Frey's June 30, 2004 request for documents. According to Valerie Vance Adeyeye, the attorney who prepared that response, she retrieved the case file in Case No. VFA-0754 and photocopied each document in that file. The case file is the only logical place in the office where any documents related to that case would be located. Ms. Adeyeye then prepared the cover letter and enclosed with it all the photocopies she had made. No copies of the OIG records that Ms. Frey now seeks were enclosed, because there were none in the case file. Ms. Adeyeye, who was the staff attorney assigned to Case No. VFA-0754, explained that, in the course of processing that appeal, she compared the unredacted and redacted versions of the records contained in OIG's investigative file by reviewing them in a conference room within the offices of OIG. Memorandum to File in Case No. TFA-0072 (October 14, 2004). Ruby Len of OIG recalled that Ms. Adeyeye reviewed the OIG file at OIG, and stated that OIG's policy is to permit OHA to review files on the premises but not to make copies of them. Memorandum of Telephone Conversation between Ruby Len, OIG, and William Schwartz, OHA (October 6, 2004). In light of those circumstances, the fact that OHA's search for documents did not yield unredacted material from the OIG investigative file does not establish that the search was inadequate. To the contrary, I conclude that OHA's search for responsive documents was adequate.

2. Office of Inspector General

The OIG responded to Ms. Frey's June 30, 2004 request for documents by stating that it was providing no documents to her because it had no responsive documents to give her other than those it provided to her in May 2002. In her Appeal, Ms. Frey contends that she suffered from a medical condition that "prevented her from properly maintaining and/or retaining the previously released documents." Appeal at 9. After discussing this Appeal with a representative of OHA, Ms. Len explained that OIG normally, and certainly in this case, will produce a second set of documents for a requester upon request. Ms. Len indicated that she will provide Ms. Frey with a second set of documents upon receipt of this Decision and Order. Memorandum of Telephone Conversation between Ruby Len, OIG, and William Schwartz, OHA (October 6, 2004). In these circumstances, such action is appropriate.

B. Request for Reconsideration

In her Request for Reconsideration (Case No. TFA-0073), Ms. Frey asks that OHA reconsider its determination, in Case No. TFA-0754, to withhold from disclosure any records pertaining to Mr. Ugol. In that case, OHA agreed with OIG's determination to withhold the names and identities

of all individuals who were interviewed in connection with the OIG investigation described above, under two exemptions of the FOIA, one that protects information the release of which “would constitute a clearly unwarranted invasion of personal privacy” (Exemption 6) and another that protects information compiled for law enforcement purposes, the release of which “could reasonably be expected to constitute an unwarranted invasion of personal privacy” (Exemption 7(C)). Ms. Frey contends that any information regarding Mr. Ugol may now be disclosed in light of his death, which she contends extinguishes any personal privacy interests Mr. Ugol may have held while he was alive.

The DOE FOIA regulations do not explicitly provide for reconsideration of a final Decision and Order. *See* 10 C.F.R. § 1004.8. However, in prior cases, we have used our discretion to consider requests or motions for reconsideration where circumstances warrant. *See, e.g., Dallas D. Register*, 28 DOE ¶ 80,218 (2002). In reviewing such requests for reconsideration, we may look to Subpart E of 10 C.F.R. Part 1003, OHA’s general administrative rules regarding modification or rescission of its orders. *See, e.g., Ron Vader*, 23 DOE ¶ 80,183 (1994). Those regulations provide that an application for modification or rescission of an order shall be processed only when the application demonstrates that it is based on significantly changed circumstances, defined in pertinent part as “a substantial change in the facts or circumstances upon which an outstanding . . . order of the OHA affecting the applicant was issued, which change has occurred during the interval between issuance of such order and the date of the application and was caused by forces or circumstances beyond the control of the applicant.” 10 C.F.R. § 1003.55(b)(1).

In the present case, Mr. Ugol’s death appears to meet the definition of significantly changed circumstances. His death may affect the current appropriateness of the determination in Case No. VFA-0754 to withhold documents pertaining to Mr. Ugol on the basis of his personal privacy interests. Consequently, this matter should be reconsidered. We have determined that the proper approach to this reconsideration is to remand the matter to OIG. OIG should review the material that Ms. Frey has submitted in support of these changed circumstances and determine whether it adequately establishes the death of an interviewee who participated in the investigation at issue and, if so, whether the death mandates the release of information heretofore withheld from Ms. Frey.

III. Conclusion

We find that the Office of Hearings and Appeals conducted an adequate search for documents responsive to Ms. Frey’s June 30, 2004 request for documents. We have ascertained that the Office of the Inspector General will provide Ms. Frey with a second set of the documents it provided to her in May 2002. Finally, we are remanding to OIG the matter of whether any documents pertaining to Mr. Ugol created or obtained in the course of the OIG investigation described above may now be released to Ms. Frey, in light of the evidence she has submitted regarding his death. Accordingly, Ms. Frey’s Appeal will be denied in part and granted in part.

It is Therefore Ordered That:

(1) The Appeals filed by Cynthia A. Frey on September 29 and 30, 2004, OHA Case Nos. TFA-0072 and -0073, respectively, are hereby granted to the extent set forth in paragraphs (2) and (3) below, and denied in all other respects.

(2) The Office of the Inspector General will promptly produce and deliver to Ms. Frey copies of all documents in its possession that are responsive to her June 30, 2004 Freedom of Information Act request.

(3) The Office of the Inspector General will promptly reconsider its determination to withhold any records concerning an investigation into drug use and leave abuse at the Office of Pipeline Certificates of the Federal Energy Regulatory Commission, but only regarding any documents it may have withheld pertaining to Maynard Ugol, in light of the evidence of his death as provided by Ms. Frey in this proceeding. Following such reconsideration, the Office of the Inspector General will promptly issue a new determination either releasing such documents or justifying the withholding of any portion or portions of those documents.

(4) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: October 22, 2004